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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

JACK M. LEVIN,

Attorney-Petitioner.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner is denied due process and equal protection of the laws upon the imposition of a disciplinary sanction which is:

a) inconsistent with the sanctions imposed upon attorneys similarly situated and,

b) in complete disregard of the findings of fact and recommendations of the Hearing and Review Boards without clear and convincing evidence of dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4) of the Illinois Code of Professional Responsibility.

2. Whether the petitioner is denied due process upon the rigid application of a mathematically based sanction without consideration for the compelling mitigating circumstances presented by the petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

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IN RE

JACK M. LEVIN,

Attorney-Petitioner.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Attorney-petitioner, JACK M. LEVIN ("petitioner"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered April 4, 1984, by which that Court suspended petitioner from the practice of law in the State of Illinois for three years and until further order of the Court.

## COURSE OF PROCEEDINGS BELOW

This cause arises from a six-count complaint filed on August 5, 1981, by the Administrator of the Attorney Registration and Disciplinary Commission against petitioner.

Each of the six counts of the complaint charged petitioner with neglect of legal matters entrusted to him in violation of D.R. 6-101(a)(3) of the Illinois Code of Professional Responsibility, as well as with conduct involving dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4). A hearing was conducted on January 14 and 15, 1982, at which time the Hearing Board, finding that the six counts of neglect, but not the misrepresentation, were proven, unanimously recommended that the petitioner be suspended from the

practice of law for a period of two years. (Appendix C, Report and Recommendation of Hearing Panel.)

Counsel for the Administrator filed exceptions with the Review Board, alleging that the Hearing Board had erred in finding that petitioner was not guilty of conduct involving misrepresentation in violation of D.R. 1-102(a)(4) of the Illinois Code of Professional Responsibility, and that disbarment was warranted. Petitioner filed exceptions to the Report of the Hearing Board with respect to the quantum of discipline recommended.

On March 17, 1983, the Review Board summarily affirmed the Hearing Board's recommendation of a two-year suspension. (Appendix D). The matter came before the Illinois Supreme Court on exceptions filed

by the Administrator to the finding that the misrepresentations alleged in Counts I, III and V were not proved and to the amount of discipline recommended upon exceptions filed by petitioner to the sanctions ordered by both Boards.

The Illinois Supreme Court, while accepting the Hearing and Review Boards' finding that the petitioner was not guilty of misrepresentation, fraud or deceit, nevertheless increased the recommended sanction from a two-year suspension to a suspension for three years and until further order of the Court, on the grounds that petitioner's conduct "went beyond mere neglect." (Appendix A, 101 Ill.2d 535, 463 N.E.2d 715 (1984.)*

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*The Illinois Supreme Court's order will be referred to herein as the "Suspension Order."

## JURISDICTION

The Suspension Order of the Illinois Supreme Court was entered on April 4, 1984. A timely Petition for Rehearing was denied on June 4, 1984. This Petition for Writ of Certiorari was filed within ninety days after the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES:

Section 1.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## STATE RULES INVOLVED

ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY:

> A lawyer shall not... neglect a matter entrusted to him. D.R. 6-101(a)(3)
>
> A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit or misrepresentation. D.R. 1-102(a)(4)

ILLINOIS SUPREME COURT RULE 771 FOR THE ADMINISTRATION AND DISCIPLINE OF ATTORNEYS, PART B:

> Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline of attorneys may be by:
>
> (a) disbarment;
>
> (b) disbarment on consent;
>
> (c) suspension for a specified period and until further order of court;
>
> (d) suspension for a specified

period of time ;

(e) censure.

## STATEMENT OF THE CASE

### Background

Petitioner graduated from John Marshall School of Law in 1959. (Tr., 169) From the time he obtained his license in May of 1960 until he became a sole practitioner in 1973, petitioner practiced law in a number of reputable Chicago firms. During the period covered by the complaint, the petitioner was engaged in high-volume plaintiff's personal injury practice. (Tr., 171) As a sole practitioner, he was known to be an intense and highly motivated individual, to the point of being a workaholic. (Tr., 87) Handling hundreds of files annually, petitioner felt

compelled to work extremely long hours, often seven days a week. (Tr., 172-173) In fact, it was quite common for petitioner to try 25 to 30 cases per year to a verdict before a jury. (Tr., 171) Many of the cases that he handled were not only for relatively small amounts of money, but were also very difficult cases of contested, even questionable liability. (Tr., 84, 889) As one witness put it:

> "Jack takes the hardest kinds of cases with the most difficult liability problems in the personal injury field and tries to make something out of them....
>
> His reputation is of trying to turn the garbage into gold.
>
> Where most lawyers would just give up on them, he takes them and tries to do the best he can." (Tr., at 85)

There is no doubt then that petitioner's

practice involved the representation of persons who probably would not have had anybody to try their cases if petitioner had not.

Eventually, petitioner's excessive work habits began to have an adverse impact on both his children and his wife. (Tr., 174) Unhappy with her husband's workaholic tendencies and his inability to devote more time to personal matters, petitioner's wife filed for divorce in 1973 or 1974. (Tr., 173, 175) It was around this same time that petitioner's oldest daughter began to experience serious emotional problems, ultimately suffering a nervous breakdown on two different occasions. (Tr., 175, 199) The situation progressively deteriorated, culminating in petitioner's wife and daughters having to undergo

psychiatric treatment. (Tr., 174, 206) Unfortunately, the difficulties encountered by petitioner in his personal life, coupled with the enormous demands of a high volume practice ultimately led him to neglect a number of legal matters.

Realizing that he had over-extended himself, and admittedly impelled to a great extent by the threatened disintegration of his family, as well as by the incidents which precipitated a prior suspension from the practice of law, petitioner began to change his practice drastically sometime between 1973 and 1976. (Tr., 175-177, 192, 204, 206) Whereas, originally, his law practice was comprised of cases taken directly by the petitioner from the client at the outset of the claim, cases referred to him at some point during

pendency by other attorneys, and cases referred to him specifically for trial, respondent now began to make good faith attempts to accept only cases, on referral from other lawyers, that were getting close on the trial call. (Tr., 175-176) Today, ninety percent of petitioner's practice is made up of files that are within three or four months of trial. (Tr., 176)

Petitioner has also taken considerable measures to review his practice so that nothing like that which has been alleged in the complaint can happen again. (Tr., 177) First, he has taken steps to have a much better indexing of the cases. (Tr., 177) Second, he has advised all of his referring attorneys to handle all depositions except those of substantial

cases. (Tr., 177) Third, petitioner has drastically reduced the number of cases requiring clients to come to him initially. (Tr., 177) He opens no more than fifteen new files a year now, preferring instead to leave the client contact to his referring attorneys. (Tr., 177) Furthermore, in addition to making a special effort to return all phone calls, petitioner has reduced the number of hours he customarily worked on a weekly basis, making a special point to avoid the office on Saturdays altogether.

William Maddux, a trial attorney from the Chicago legal community, who has practiced law for 23 years and has known petitioner continuously on a professional basis for that same period of time, testified as to petitioner's honesty, integrity, good moral character, and

fitness to practice law. (Tr., 160) Mr. Maddux stated:

> "In my opinion and from my personal observations, Jack Levin is an able, competent trial lawyer., Not only able and competent, but a person you can believe.
>
> I never found him to make a statement that was deemed or found to be untrue. I can assure you his work is good." (Tr., at 161)

Furthermore, according to Mr. Maddux, who related he has had ample opportunity to observe petitioner's professional work over the years, petitioner served his clients well and loyally and to the best of his ability. (Tr., 161) This is significant in light of the fact that petitioner had a reputation in the Chicago legal community for handling very difficult cases. (Tr., 84) Yet, as Mr. Maddux noted, "I never saw anything other than able handling." (Tr., 161-162)

Notwithstanding the incidents of neglect in the instant case, Mr. Maddux testified he is still of the opinion that petitioner is competent to practice law. (Tr., 166)

The Suspension Order

The Illinois Supreme Court, after reviewing the findings of fact and the recommendations of the Hearing and Review Boards considered two issues: 1) whether the Hearing and Review Boards erred in not finding dishonesty or misrepresentation in petitioner's conduct, and 2) whether the two year suspension recommended by both the Hearing and Review Boards was appropriate.

In its opinion, the Court acknowledged the findings of the Hearing and Review Boards inasmuch as they found no evidence

of misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4). However, despite the concession that there was no violation of D.R. 1-102(a)(4) and the recognition that "we gave considerable deference to findings of fact by the Hearing Board," the Court chose to ignore the Boards' recommendations of a two-year suspension on the grounds that: (1) the petitioner's "blatant misstatements" went "beyond mere neglect" and (2) the petitioner had engaged in six instances of misconduct subsequent to a previous sanction. Specifically, the court stated that while the findings of the Hearing Board "are entitled to the same weight as any other fact finder" and are accorded "considerable deference" by the Supreme Court, the Court was "not required to

accept them when the Board's conclusion is not established by clear and convincing evidence." 101 Ill.2d at 539, 540.

Significantly, the Supreme Court rejected as against "clear and convincing evidence" only those findings of the Board relating to the petitioner's quantum of neglect. However, in imposing the increased sanction of a three-year suspension and "until further order" on the finding that petitioner's conduct involved "blatant misstatements," the Court sought to impose a sanction tantamount to disbarment and appropriate only in those circumstances where dishonesty, actual misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4) has been demonstrated by clear and convincing evidence. In re

March, 71 Ill.2d 382, 376 N.E.2d 213 (1978). Thus, the Illinois Supreme Court, on the same set of facts and with no additional finding of a D.R. 102(a)(4) violation as requested by the Administrator, deemed it proper to not only augment the period of suspension, but to considerably aggravate the harshness of the sanction by prohibiting reinstatement "until further order of the Court." 101 Ill.2d at 542.

In this context, it is important to note that the court expressly recognized that in order to safeguard the public and maintain the integrity of the legal profession, "it is important that there be uniformity in the sanctions afforded to different attorneys." 101 Ill.2d at 541, citing In re Clayter, 78 Ill.2d 276, 399 N.E.2d 1318 (1980). Nevertheless, in

distinguishing or ignoring those disciplinary cases in which it had ordered significantly lighter sanctions on facts substantially congruent with those material to the instant case, the Illinois Supreme Court inexplicably chose to disregard this standard. Distinguishing In re Chapman, 95 Ill.2d 484, 448 N.E.2d 852 (1983), solely on the basis of that respondent's alcoholism, the Court unfairly trivialized the compelling circumstances surrounding the petitioner's misconduct in this case and ignored the fact that the respondent in Chapman had a history of previous disciplinary sanctions and made repeated "prejudicial misstatements" to his client.

The Court maintained that its decision in the instant case was consistent with the discipline imposed in

In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982) and In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978), on the grounds that "the neglect found here includes a greater number of instances and for that reason alone, even without regard to the respondent's previous misconduct, calls for a longer suspension." 101 Ill.2d at 543. However, as petitioner in his Petition for Rehearing pointed out, while the sanctions in Johnson and Levinson apparently present mathematical consistency in terms of the period of supervision, i.e., six months suspension for each instance of neglect, in neither case did the court impose upon the respondent the added burden of his proving he is qualified to return to practice at the end of the suspension

period.

Clearly, in misconstruing Johnson and Levinson and failing to address or consider those cases cited in petitioner's brief in which repeated acts of neglect were accompanied by "blatant misstatements" and/or actual misrepresentation, In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961), the Court sought to evade the plain impact of those decisions which impose substantially lighter sanctions then those dictated in the instant case.

Similarly, the Illinois Supreme Court's decision to rigidly apply a mathematically determined sanction based upon its interpretation of In re Johnson, supra, 444 N.E.2d at 153, and In re

Levinson, supra, 376 N.E.2d at 998, ignores the unique mitigating factors present in the instant case. As the Hearing Board noted:

> "No doubt exists in the minds of the Panel that during the heart of the period involved the Respondent was embroiled in serious, substantial marital and family problems... [and] It is undoubted that the personal problems of the Respondent may be part of the reason for his inaction on the cases" (Appendix C)

Similarly, the Hearing Board stated:

> "The Panel implies no criticism of the Respondent for accepting cases of such adverse liability or apparently limited recovery. In fact, respondent is to be commended for accepting such difficult cases for clients who would not ordinarily have had a day in court." (Appendix C)

Evidence of petitioner's honesty and good reputation in the community, his lack of corrupt or dishonest motives and his willingness to cooperate with the

Commission was not addressed or considered by the Illinois Supreme Court in its opinion. While noting that the petitioner had taken on "a high volume, personal injury trial practice" involving many difficult cases "of dubious liability and small sums of money," the Illinois Supreme Court failed to take into account the Hearing Board's finding that the petitioner's deviation from required professional standards was mitigated in part by the high pressure nature of his practice and the serious professional problems resulting therefrom. 101 Ill.2d at 537. The Court further chose to discount the evidence that petitioner's continuous good faith efforts to substantially change the nature of his practice presented a mitigating factor dictating a lighter

sanction, regardless of the point in time when the major change occurred. The Court's justification for the increased sanction clearly ignored the compelling circumstances surrounding the petitioner's misconduct and rested solely on evidence of the petitioner's earlier discipline, the number of instances of neglect and the "irreparable prejudice to petitioner's clients - factors previously weighed and taken into consideration by the Hearing and Review Boards in their recommendation to the Illinois Supreme Court of a two-year suspension.

The unwarranted and harsh sanction imposed by the Court without consideration for sanctions imposed in cases substantially similar to the case at bar or the mitigating factors

present in the instant case, thereby resulted in an abrogation of petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment.

PETITIONER TIMELY RAISED HIS CLAIM THAT THE COURT'S HARSH AND UNPREDICTABLE SANCTION VIOLATED EQUAL PROTECTION.

Petitioner first raised his constitutional objection to the sanctions imposed by the Illinois Supreme Court in his Petition for Rehearing in which he asserted that the sanction was the effective equivalent to disbarment and was constitutionally inconsistent with sanctions imposed on other attorneys in similar cases. The Petitioner concluded that:

> These inconsistencies... raise grave constitutional issues of deprivation of due process and equal protection under the law. (Petition for Rehearing, pg. 3)

Petitioner's objection to the Court's sanction in his Petition for Rehearing was timely in that the court's increased sanction was both unexpected and unpredictable in light of the pattern of precedent set by that Court and the recommendations of imposed by the Hearing and Review Boards. Both the Hearing Board and the Review Board recommended a two-year suspension on the grounds that petitioner's conduct did not rise to the level of dishonesty, misrepresentation, fraud or deceit necessary for violation of D.R. 1-102(a)(4). Even upon a finding by the Illinois Supreme Court that petitioner's conduct went "beyond mere neglect," the sanctions previously imposed in cases involving either neglect or misrepresentation have not imposed the

added burden on the respondent to prove after a period of suspension that he is qualified to resume his practice. In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982); In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978).

Petitioner concedes that the general rule is that a "constitutional question is urged too late, if put forward for the first time upon petition for rehearing." Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 366 (1932). It is clear, however, that the instant case falls into the class of decisions in which this Court will review a state supreme court's unpredictable foreclosure of a party's constitutional right. Specifically, Justice Cardozo in Great Northern spoke of the exception into which the petitioner falls:

> The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered or decided (citations omitted), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. 287 U.S. at 367. (emphasis added)

Thus, where "the objections of the petitioner could not [have been] made in advance of the event," the United States Supreme Court will assert jurisdiction over the matter in order to prevent an unjustifiable foreclosure of a constitutional claim arising only upon the rendition of a decision by a state supreme court. Great Northern, supra, 287 U.S. at 367; Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

In the instant case, petitioner was confronted with an unexpected and unwarranted sanction which departed not only from the recommendations of the Hearing and Review Boards, but from the precedent set by previous Illinois Supreme Court decisions. Petitioner cannot reasonably be bound to anticipate the unconstitutional departure from precedent in order to invoke federal protection in advance. The federal issue in this case arose from the unanticipated ruling of the state court, and petitioner's presentation of this issue in his Petition for Rehearing "was timely since it was raised at the first opportunity." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930).

## ARGUMENT

### Introduction

This Court has held that it will review a state court order denying an attorney's right to practice law where the attorney makes a substantial allegation that the order violates the due process or equal protection clause of the Fourteenth Amendment. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Theard v. United States, 354 U.S. 278 (1957). Implicit in this holding is this Court's recognition that "without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes... the right of an individual... to engage in any of the common occupations of life..." Board of

Regents v. Roth, 408 U.S. 564, 572 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1922).

More specifically, upon earning the privilege to practice law "an attorney's calling or profession is his property within the literal sense and meaning of the Constitution." Ex parte Wall, 107 U.S. 265, 289 (1883). In repeatedly acknowledging that after an attorney has earned his license he has gained--in terms of "liberty"--the right to practice law, this Court has held that the state's exercise of its disciplinary powers may threaten an attorney with a "significant deprivation of liberty" as well as subject him to a risk of "grave stigma." Santosky v. Kramer, 455 U.S. 745 (1982); Wisconsin v. Contantineau, 400 U.S. 433 (1971). As Chief Justice Marshall in

Ex parte Burr, 22 U.S. 529 (1884), stated:

> ...the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. 22 U.S. at 529.

In accord with this Court's holdings, the Illinois Supreme Court has held that although the dual purpose of the disciplinary system is to safeguard the public and maintain the integrity of the legal profession, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980), the duty of the courts to protect the public from the impositions and improper practices of attorneys must not be exercised in a despotic manner and without legal discretion. In re Fisher, 15 Ill.2d 139, 153 N.E.2d 832 (1958).

In Fisher, the Illinois Supreme Court citing In re Donaghy, 402 Ill. 120, 123, 83 N.E.2d 560, 562 (1949), noted:

> The legal calling is a time-honored profession and the Courts owe a duty to protect the public from impositions and improper practices. This duty has repeatedly been declared by this court. (citations omitted) Such duty, and the manner in which it is exercised, must not be despotic, but the charges must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent. (citation omitted) The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof. 153 N.E.2d at 840.

Similarly, the court in Fisher expressed its sentiment on the subject of a lengthy suspension stating:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. (citations omitted) The court should, therefore, disbar

> in moderation. Likewise, the same considerations obtain in the application of a three-year suspension rule. A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers. In the meantime his income and livelihood have ceased to exist. 153 N.E.2d at 840-841.

In light of these considerations, a state may not exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the due process or equal protection clauses of the Fourteenth Amendment. Due process and equal protection require that the state action have a "rational connection' with the attorney's fitness or capacity to practice law. Schware, supra, 353 U.S. at 238. Specifically, under the equal

protection clause a classification must be reasonable and not arbitrary or capricious, and rest upon some ground of difference having a fair and substantial relation to the object of legislation such that all persons similarly circumstanced are treated alike. McGowan v. Maryland, 366 U.S. 420 (1961). Similarly, due process requires that the exercise of power resulting in the deprivation or partial destruction of an individual's professional life rest on a "reasonable basis" and bear some "rational relation" to that individual's fitness to pursue his profession. Barsky v. Board of Regents of New York, 347 U.S. 442 (1953). In either context, where the evidence does not "rationally support" the grounds for denying the right to practice law, the state's action

may be classified as an arbitrary and discriminatory "denial of due process and equal protection of the laws." Konigsberg, supra, 353 U.S. at 262.

In the instant case, the petitioner contends he has been denied due process and equal protection of the law based upon the following:

1) the imposition of a sanction equivalent to disbarment which is:

a) inconsistent with the sanctions imposed on attorneys similarly situated, and

b) in complete disregard of the findings of fact and recommendations of the Hearing and Review Boards without clear and convincing evidence of dishonesty, fraud, deceit or misrepresentation in violation of D.R. 1-102(a)(4), and

2) upon the rigid application of a mathematically based sanction without consideration for the compelling mitigating circumstances presented by the petitioner.

The basis of the Illinois Supreme Court's decision as articulated by that court, rested on its desire to "safeguard the public and maintain the integrity of the legal profession." 101 Ill.2d at 539. However, this objective is not secured by the arbitrary and discriminatory sanction imposed on the petitioner. No rational basis exists for the difference in punishment and in fact, such a disparity effectively inhibits the communication to the public and the profession the standard of conduct expected of persons licensed to practice law in Illinois. As a result of the Court's arbitrary failure to consider any mitigating circumstances, this case results in the effective disbarment of an attorney who has

changed the nature of his practice to prevent further instances of neglect and who was commended by the Hearing Board for his willingness to represent clients who would not ordinarily have had a day in court. (Appendix C). Conversely, uniformity of sanctions after a consideration of mitigating factors will secure the rights of due process and equal protection under the laws as guaranteed by the Fourteenth Amendment.

I. THE PETITIONER IS DENIED DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS AS A RESULT OF THE ILLINOIS SUPREME COURT'S ARBITRARY IMPOSITION OF A SANCTION INCONSISTENT WITH DISCIPLINE IMPOSED ON ATTORNEYS CHARGED WTH SIMILAR MISCONDUCT AND IN DISREGARD OF THE HEARING AND REVIEW BOARDS' FINDINGS AND RECOMMENDATIONS WITHOUT CLEAR AND CONVINCING EVIDENCE OF DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION IN VIOLATION OF D.R. 1-102(a)(4).

A. The Illinois Supreme Court's Sanction Is An Arbitrary And Discriminatory Deviation From The Sanctions Imposed Upon Those Attorneys Charged With Similar Misconduct.

The deprivation of a lawyers's license "is a punishment or penalty" imposed on the lawyer "by way of adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S. 544, 550-551 (1968). Further characterizations in Konigsberg, supra, 353 U.S. at 252, and Ruffalo, supra, 390 U.S. at 544, concerning the attorney's interest in his license, and the nature of the proceedings depriving him of it, suggest that standards more exacting than those governing ordinary civil cases must be applied to disciplinary proceedings. In particular, this court's decisions in Ruffalo, supra, and Spevack v. Klein, 385

U.S. 511, 515 (1967), where the requirements of adequate notice of charges and the privilege against self-incrimination were extended to disbarment proceedings, appear to recognize that because of their similarity with conventional criminal sanctions, disciplinary actions against attorneys entitle the attorney to many of the constitutional protections extended to those accused of criminal violations. One such constitutional protection currently being recognized is the need for uniformity tempered by mitigating factors in sentencing.

Significantly, the Illinois Supreme Court in its opinion in the instant case acknowledges that "in order to safeguard the public and maintain the integrity of the legal profession... it is important

that there be uniformity in the sanctions afforded to different attorneys." 101 Ill.2d at 541, citing In re Clayter, 78 Ill.2d 276, 283, 399 N.E.2d 1318 (1980). As the court stated in In re Saladino, 71 Ill.2d 263, 375 N.E. 2d 102 (1978):

> Although appropriate facts may always be considered in mitigation, predictability and fairness require a degree of consistency in the selection of sanctions for similar types of misconduct. That degree of consistency can only be achieved if sanctions are based on articulated standards of conduct. These standards must be "derived from the underlying purposes of our disciplinary process, which are to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach. 375 N.E.2d at 106-107.

Thus, "where facts are strikingly similar to those in another case, a degree of uniformity in the discipline sought should be imposed." In re Clayter,

supra, 399 N.E.2d at 1321.

Despite its recognition of the need for uniformity of sanctions, the Illinois Supreme Court failed to consider or address those cases cited in the petitioner's brief where the Court had ordered a lesser sanction as the appropriate discipline on facts substantially congruent with those material to this case. In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961).

As early as 1961, the court ordered censure for an attorney charged with five counts of neglect. In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961). In that case, each count contained the charge that Mr. Ahern received payment

for services, but either did not render any services or the services rendered by him were simply not commensurate with the amount received. While it was apparent in the matter involving all five counts that respond had failed to perform the services for which he had been retained, the court held that censure rather than suspension constituted sufficient punishment. There, as in the instant case, respondent had personal problems involving the illness of a daughter and his wife. In reaching its decision, the Court took into consideration these extenuating circumstances noting that respondent's personal problems and his subsequent difficulties adjusting to his personal life may have explained a good part of his misconduct. Moreover, although Mr. Ahern's misconduct clearly

involved an error in judgment, it was not shown to have resulted from corrupt motives.

In 1977, the Illinois Supreme Court held that a one-year suspension from the practice of law was the appropriate sanction for an attorney who showed a "pattern of consistent neglect." In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977). Respondent's neglect in that case was based on a series of agreements to represent clients, acceptance of fees or money for costs, neglect in peforming and completing legal services, and frequent inaccessibility to a client. Although it was clear that Mr. Taylor acted with consistent neglect and that disciplinary action was warranted, the Court, nonetheless, concluded that a three-year suspension would not serve the

interest of the public and the legal profession given respondent's lack of overtly dishonest acts and corrupt motives.

In a more recent decision involving facts similar to those at bar, censure was again held to be the appropriate sanction. In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982). Respondent in Kink manifested a lack of care in handling the estates of three separate clients, several instances of which extended over a period of years and operated to the irreparable prejudice of his clients. The record indicated that the respondent failed to close the estates, failed to file certain documents, failed to pay taxes and misrepresented the status of the case to clients. Respondent was less than candid with at least one client, and

he remained inaccessible despite his clients' attempts to contact him.

In reaching its decision, the Court in Kink took into consideration a number of extenuating circumstances which, in its opinion, tended to mitigate or explain respondent's misconduct. Among other things, the Court noted that respondent's conduct was apparently not prompted by dishonest motives and that he had been cooperative and candid during the proceedings, two factors which have been held to be significant in determining the appropriate punishment. In re Clayter, 78 Ill.2d 276, 399 N.E.2d 1318 (1980); In re Damisch, 38 Ill.2d 195, 230 N.E.2d 254 (1967). Consideration was also given to the testimony of witnesses as to respondent's excellent reputation in the community.

The Court further observed that although the respondent had been negligent and dilatory in representing his clients' interests, he had in fact--similar to the instant case--rendered some services on their behalf. The Court, finding the circumstances analogous to those in Ahern, concluded once again that neither the best interests of the public nor those of the legal profession would be served by suspending the respondent.

The facts in In re Chapman, 95 Ill.2d 484, 448 N.E.2d 852 (1983), which the Illinois Supreme Court chose to distinguish solely on the basis of that respondent's alcoholism, are analogous to the facts material to the instant case. In Chapman, the Court held that the neglect of legal matters coupled with misrepresentation of the status of the

case to the client, warranted a two-year probationary suspension, notwithstanding respondent's history of previous discipline and his failure to cooperate in the disciplinary proceeding. It is worthwhile noting that the misconduct in Chapman commenced less than a year from the conclusion of an earlier disciplinary proceeding. In fact, respondent had already been disciplined for professional misconduct on two prior occasions. In one instance, he was reprimanded. In 1978, he was suspended for three months for neglecting clients' affairs, the same misconduct with which he was subsequently charged in 1983.

Petitioner's misconduct in the instant case differs little from the cases cited above in which the Illinois Supreme Court found significantly lighter

sanctions were warranted. All involved a pattern of consistent neglect which amounted to the non-performance of legal services owed to a client coupled with "misstatements" and/or actual misrepresentations, and in Ahern and Chapman, a history of previous disciplinary sanctions. Clearly, the Illinois Supreme Court's decision to ignore the impact of these cases results in a gross deviation from the established sanctions for petitioner's misconduct to the prejudice of the petitioner's constitutional rights and the legal profession as a whole.

B. The Illinois Supreme Court Ignored The Findings And Recommendations Of The Hearing and Review Boards Without Clear and Convincing Evidence of Dishonesty, Fraud, Deceit Or Misrepresentation In Violation of D.R. 1-102(a)(4).

Paralleling the recognized need for uniformity in the imposition of disciplinary sanctions, the findings of the Hearing and Review Boards are given "great deference" by the Illinois Supreme Court in its reviewing capacity, as these entities are best situated to "making factual findings in contested matters and developing uniformity in our disciplinary system." In re Cohen, 83 Ill.2d 521, 416 N.E.2d 256 (1981). As the Court in Cohen noted:

> While this court has the ultimate responsibility to impose and enforce attorney discipline... the findings and recommendations of the Inquiry, Hearing and Review Boards are entitled to and receive our serious consideration. These boards, with the exception of the Review Board, see and hear the witnesses and play important roles in screening and hearing cases, making factual findings in contested matters and developing uniformity in our disciplinary system. 416 N.E.2d at

258.

Similarly, the Court in In re Kink, supra, 442 N.E.2d at 209, quoting In re Hopper, 85 Ill.2d 318, 423 N.E.2d 900 (1981), noted:

> Where the question is credibility of witnesses, resolution of conflicting testimony, or other such fact-finding judgments, the hearing panel should be afforded a good deal of deference.

Moreover, "where the findings of those boards are based on uncontradicted and clear evidence they will be adopted." In re Wigoda, 77 Ill.2d 155, 395 N.E.2d 571 (1979).

In its opinion in the instant case, the Illinois Supreme Court expressly acknowledged that "a finding by the Hearing Board of the Disciplinary Commission is entitled to the same

weight as that of any other factfinder." 101 Ill.2d at 539 citing In re Kink, 92 Ill.2d 293, 301, 442 N.E.2d 206 (1982), and In re Feldman, 89 Ill.2d 7, 10, 431 N.E.2d 388 (1982). The Court further conceded that "we give considerable deference to findings of fact by the Hearing Board." 101 Ill.2d at 539.

Nevertheless, the Court chose to ignore the findings of the Hearing and Review Boards--without any further findings of fact beyond those found by the Board--on the grounds that it was "not required to accept [the Board's findings] when the Board's conclusion is not established by clear and convincing evidence." 101 Ill.2d at 540. Conceding that "although the Board found that there was no misrepresentation here," the Court concluded that petitioner's conduct was

in the ambiguous realm of "beyond mere neglect" without rising to the level of dishonesty, misrepresentation, fraud or deceit in violation of D.R. 1-102(a)(4).

This Court has determined that there is a denial of due process and equal protection where an individual is denied the right to practice law where no evidence in the record rationally supports a finding of doubt about the attorney's fitness or capacity to practice law. Konigsberg, supra, 353 U.S. at 252. In the instant case, petitioner is faced with a sanction equivalent to disbarment. While the petitioner in this case does not concede that the original two-year suspension was correct, he maintains that in comparison with the discipline meted out by the Illinois Supreme Court, the sanctions of

the Hearing and Review Boards are more consistent with the degree of his misconduct. Clearly, disbarment is an extreme measure appropriate only in those limited circumstances where intentional fraud, deceit, misrepresentation or dishonest motive is shown by clear and convincing evidence. In re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978). Neither the Hearing and Review Boards nor the Illinois Supreme Court found evidence of such egregious conduct as to warrant the imposition of such a sanction. In this case, the Court's interest in protecting the public and the legal profession from improper conduct of the petitioner will not be served by the suspension for three years and "until further order." Not only does the

disparity in sanctions prevent the uniform application of the law, but the Court's failure to give credence to the findings of the Hearing Board effectively inhibits the uniform development of sanctions by that body best able to judge the credibility of witnesses and evidence.

II.

THE ILLINOIS SUPREME COURT'S MECHANICAL APPLICATION OF A MATHEMATICALLY DETERMINED SANCTION IGNORED THE COMPELLING MITIGATING CIRCUMSTANCES SURROUNDING THE PETITIONER'S MISCONDUCT.

It is well-settled under Illinois law that while uniformity of sanctions is a fundamental consideration, In re Clayter, 78 Ill.2d 276, 283, 399 N.E.2d 1318 (1980); In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978), the determination of appropriate discipline must also involve and often times turn upon, the

unique factors of mitigation present in each case. In re McLennon, 93 Ill.2d 215, 443 N.E.2d 553 (1982); In re Hopper, 85 Ill.2d 318, 423 N.E.2d 900 (1981). The rule as established by the Illinois Supreme Court parallels that enunciated by this Court for consideration in criminal sentencing. As this Court has stated: "[T]he sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." Williams v. Oklahoma, 358 U.S. 576, 585 (1959). Accord, United States v. Jonnson, 507 F.2d 826, 830 (7th Cir. 1974), cert. denied, 421 U.S. 949 (1975). Underlying this decision is the rationale that the mechanical application of a sentence violates the equal protection and due process clauses of the

Fourteenth Amendment in that it results in equal sentences for those defendants who as a result of individual mitigating circumstances may not be similarly situated.

In the instant case, the Illinois Supreme Court clearly ignored all evidence of mitigating circumstances found by the Hearing and Review Boards, and under the guise of uniformity, sought to impose a rigid mechanical sanction derived from its erroneous interpretation of those sanctions imposed in In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982) and In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998 (1978). The Court maintained that its decision in the instant case was consistent with the discipline imposed in Johnson and Levinson cn the grounds that "the neglect

found here includes a greater number of instances and for that reason alone, even without regard to the respondent's previous misconduct, calls for a longer suspension." 101 Ill.2d at 543.

Notwithstanding the Illinois Supreme Court's contention that their decision "is consistent" with Johnson and Levinson, the Court's imposition of a three-year suspension and "until further order" sanction--a sanction effectively tantamount to disbarment--is, in fact, a gross deviation from the discipline imposed in those two cases and in previous decisions. Neither Johnson nor Levinson imply that each instance of neglect should be punished with six months suspension. Clearly, neither Johnson nor Levinson advise "three years suspension until further order" as the

appropriate sanction for misconduct similar to that in the instant case.

The Court, in the imposition of this harsh and unwarranted sanction solely on the basis of "the number of instances of neglect," clearly sought to avoid the plain impact of those decisions in similar cases where significantly lighter sanctions were imposed despite the evidence of a "consistent pattern of neglect" and misrepresentations to clients. In re Kink, supra, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, supra, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, supra, 23 Ill.2d 69, 177 N.E.2d 197 (1961). The effective disbarment imposed in this case not only grossly deviated from sanctions imposed in similar cases--to the prejudice of the petitioner's constitutional rights--but

clearly failed to protect the public or the integrity of the judicial process or advance the standards of ethics of the legal profession.

Moreover, the Court's failure to consider the mitigating circumstances surrounding the petitioner's misconduct in the instant case violated the petitioner's rights of due process and equal protection under the laws. The petitioner offered the Illinois Supreme Court two reasons for the non-performance of his professional duties, vis., a high volume intensely demanding practice and serious personal problems. The record demonstrates the Hearing Board's recognition that "the personal problems of the Respondent may be part of the reason for his inaction on the cases" and that "Respondent is to be commended for

accepting such difficult cases for clients who would not ordinarily have had a day in court." (Appendix C) The record further illustrates that the petitioner has a reputation for honesty in the legal community and was cooperative and candid with the Commission.

The circumstances surrounding the petitioner's conduct were sufficiently compelling to dictate a lesser sanction than that imposed by the Court. In addition, the Court's application of a mathematically based sanction without consideration of the mitigating circumstances present in the instant case resulted in a complete abrogation of the petitioner's rights of due process and equal protection as guaranteed by the Fourteenth Amendment.

## CONCLUSION

For the reasons set out above, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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No.

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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

JACK M. LEVIN,

Attorney-Petitioner.

## APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In The

# Supreme Court of the United States

October Term, 1984

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IN RE

JACK M. LEVIN,

Attorney-Petitioner.

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## APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

# APPENDIX A

In re Jack M. LEVIN, Attorney,
Respondent.

No. 58459.

Supreme Court of Illinois.

April 4, 1984.

Rehearing Denied
June 4, 1984.

Attorney disciplinary proceeding was brought. The Supreme Court, Simon, J., held that neglect of various legal matters and misleading both clients and other attorneys into believing that clients' rights were being actively protected warrants suspension for three years.

Respondent suspended.

Underwood, J., dissented and filed an opinion in which Thomas J. Moran, J., joined.

* * *

SIMON, Justice:

Respondent, Jack M. Levin, was charged by the Administrator of the Attorney Registration and Disciplinary Commission with neglect of various legal matters entrusted to him, and with misrepresentation, dishonesty and deceit. The Hearing Board found respondent guilty of neglect, but not misrepresentation, and recommended his suspension from the practice of law for two years. The Review Board affirmed and approved the recommendation. The Administrator filed exceptions, urging that the respondent's conduct involved misrepresentation, and that

he should be disbarred. Respondent also excepted, urging that the suspension recommended was too severe a sanction.

Respondent has been licensed to practice law in Illinois since 1960, and has been previously disciplined for conduct similar to that alleged here. (*In re Levin* (1979), 77 Ill.2d 205, 32 Ill.Dec. 870, 395 N.E.2d 1374.) Respondent engages in a high volume, personal injury trial practice. During the time period involved here, respondent was an individual practitioner who accepted some cases directly from clients, but primarily accepted referrals from other lawyers of cases at all stages, from initiation to shortly before trial. Many of the cases involved dubious liability and small sums of money.

Respondent admits most of the allegations in the complaint. He admits neglect, but he denies any dishonesty, intentional misrepresentation, or any pattern of negligence. Instead, he attributes his conduct to the pressures of a high volume, high intensity practice where he assumed sole responsibility for everything he undertook, and to personal problems including marital difficulties and his daughters' health. Respondent claims to have made a number of changes in his practice to insure that this type of neglect cannot recur.

Count I involves respondent's representation of Manuel Santillanes for injuries suffered in a barroom altercation. Although respondent was employed within one month of the occurrence, suit was not filed until after the one-year dramshop and two-year personal injury statutes of limitations had expired, and proper service was never completed. One year after the complaint had been dismissed, respondent met with Santillanes and advised him that he was negotiating a settlement with the insurance company. Respondent did not tell Santillanes that the complaint had

been dismissed. When Santillanes investigated and discovered the dismissal, he filed a malpractice suit against respondent. The resulting $10,000 judgment remains unsatisfied.

Count II involves respondent's representation of Christina Gomez, who was 10 years old when she fell through a hole in a fire escape which provided access to the apartment in which she lived. Although respondent notified the realty company of his representation of Christina Gomez, no suit was filed. When asked about the case, respondent explained that he was trying to settle the matter out of court. After Josephine Carerra, Christina Gomez' mother, initiated disciplinary action, respondent wrote a letter indicating that he would no longer represent Christina Gomez and that she must file suit within two years. Carrera testified that she tried repeatedly to obtain the file from respondent in order to engage another attorney, but she was unsuccessful.

Count III involves a claim by Jarryl Monegain against his own insurer when that company refused to pay for the property damage arising from an automobile accident. The claim was referred by attorney David Feldman after he had been unsuccessful in negotiating with the insurer. When Monegain was unable to contact respondent, he reported this to Feldman. In writing and in person Feldman urged respondent to contact the client and to institute arbitration proceedings. When Feldman wrote respondent, confirming his belief that a lawsuit had been filed, respondent did not deny this understanding. No suit or arbitration proceedings were ever initiated by respondent; Feldman eventually filed a lawsuit.

Count IV involved a case referred by attorney Charles May. It arose from Matilda Nelson's difficulties when she was accused of shoplifting in a college bookstore. A civil

suit against the store employees had already been filed by another attorney when respondent accepted the case. Respondent failed to comply with an order to file an amended complaint and the case was dismissed. He did not disclose the dismissal to the client, but indicated in response to her inquiries that he would resolve the matter. Respondent did not reply to many of the client's attempts to communicate with him. Nelson's claim is now barred.

Count V involves a wrongful death and dramshop claim referred by attorney Bernard Davis on behalf of Anne Fouts, whose husband was killed in an automobile accident. After respondent filed an appearance in the pending case, he was given 14 days to file an amended complaint, but never did. The complaint was dismissed when respondent failed to appear at a hearing. His motion to vacate the dismissal was never served on the defendants. The Fouts' claim is now barred. For more than two years respondent did not tell the client that her claim had been dismissed, but wrote letters indicating that he would be going to the courthouse to work on the case. There were some early settlement negotiations in which respondent urged Mrs. Fouts to reject a low offer. Davis has now settled Mrs. Fouts' malpractice claim against him, but respondent has not settled with her.

The final count involves the automobile accident claim instituted by Yvonne and Bernard Perry. The Perrys were referred to respondent by attorney Jack Marino, and their case was dismissed after they failed to appear at numerous scheduled depositions. The Perrys were aware of only two of these and had explained their inability to attend in advance. When the Perrys did not hear about a further deposition date and respondent did not return their calls, they filed a disciplinary complaint. Respondent

now claims that he settled the case but he did not contact the Perrys. The Perrys eventually retained a new attorney, who settled the case for $1,500.

The first question is whether the Hearing Board erred in not finding dishonesty or misrepresentation in respondent's conduct. A finding by the Hearing Board of the Disciplinary Commission is entitled to the same weight as that of any other fact finder. (*In re Kink* (1982), 92 Ill.2d 293, 301, 65 Ill.Dec. 895, 442 N.E.2d 206; *In re Feldman* (1982), 89 Ill.2d 7, 10, 59 Ill.Dec. 103, 431 N.E.2d 388.) We give considerable deference to findings of fact by the Hearing Board, but we are not required to accept them when the Board's conclusion is not established by clear and convincing evidence. (*In re Kink* (1982), 92 Ill.2d 293, 301, 65 Ill.Dec. 895, 442 N.E.2d 506.) Although the Board found that there was no misrepresentation here, we conclude from the record that respondent's conduct went beyond mere neglect for failing to notify clients and referring attorneys that cases had been dismissed or that the statute of limitations had run, and instead reassuring them that he was working on the cases or that a suit had been filed, respondent misled both clients and attorneys into believing that he was actively protecting the clients' rights. Respondent's misstatements were designed to reassure clients and attorneys, leaving them sanguine with respect to the respondent's efforts on their behalf, so that they would not be alerted to take affirmative steps to protect the clients' interests before it was too late to do so. Relying on respondent's representations, clients were lulled into inaction with regard to the matter they had entrusted to the respondent and from seeking other counsel, and referring attorneys saw no reason to take an active part in filing or monitoring the progress of lawsuits on their clients' behalf. While respondent's

remarks may not have been fraudulent, they were blatant misstatements which created a false sense of security in those who heard them, and they were inaccurate representations of what the respondent had actually done. Respondent does not deny making many of these misleading statements. Whatever respondent's intent when he made them, the result was irreparable prejudice to his clients' rights.

The remaining question is the appropriateness of the recommended disciplinary sanction of suspension for two years. We do not agree with the Administrator that respondent's actions warrant disbarment. On the other hand, respondent was guilty of serious breaches of the responsibility he owed his clients and other attorneys, and we reject his suggestion that his conduct merits a lenient sanction such as censure or a very short suspension.

Culpable neglect of a client's affairs is misconduct sufficient to warrant disciplinary sanction. (*In re Chapman* (1983), 95 Ill.2d 484, 69 Ill.Dec. 940, 448 N.E.2d 852; *In re Levin* (1979), 77 Ill.2d 205, 32 Ill.Dec. 870, 395 N.E.2d 1374. *In re Ahern* (1961), 23 Ill.2d 69, 177 N.E.2d 197.) On many occasions, this court had found suspension to be an appropriate sanction for comparable neglect where corrupt motive and moral turpitude have not been shown. *In re Johnson* (1982), 93 Ill.2d 441, 445, 67 Ill.Dec. 114, 444 N.E.2d 153; *In re Levinson* (1978), 71 Ill.2d 486, 493, 17 Ill.Dec. 669, 376 N.E.2d 998; *In re Chapman* (1978), 69 Ill.2d 494, 501, 14 Ill.Dec. 479, 372 N.E.2d 675; *In re Taylor* (1977), 66 Ill.2d 567, 571, 6 Ill.Dec.898, 363 N.E.2d 845; *In re Ahern* (1961), 23 Ill.2d 69, 74, 177 N.E.2d 197.

Our attorney disciplinary proceedings are designed to safeguard the public and maintain the integrity of the legal profession. (*In re Levin* (1979), 77 Ill.2d 205, 211,

32 Ill.Dec. 870, 395 N.E.2d 1374.) In order that this court fulfill those goals, it is important that there be uniformity in the sanctions afforded to different attorneys (*In re Clayter* (1980), 78 Ill.2d 276, 283, 35 Ill.Dec. 790, 399 N.E.2d 1318), and also that each case be carefully evaluated on its own merits. *In re Hopper* (1981), 85 Ill.2d 318, 324, 53 Ill.Dec. 231, 423 N.E.2d 900.

Respondent here has been found guilty of six separate counts of neglect. We find a pattern of neglect and of misstatements sufficient to warrant more significant discipline than the hearing and review boards have recommended. We are mindful of the fact that respondent was previously suspended for three months for misconduct very similar to what we have in this case. It is a cause for concern that the court's previous discipline of the respondent did not result in sufficient changes in his behavior to prevent these later instances of neglect. Although respondent claims to have changed the nature of his practice dramatically in order to avoid similar difficulties, the major changes appear to have occurred at the time of the earlier disciplinary proceeding, and it appears that whatever changes were made did not prevent the incidents with which we are now concerned here. Therefore, we cannot consider the changes to be a significant mitigating factor arguing in favor of a short suspension. Bearing in mind respondent's earlier discipline and the number of instances of misconduct involved here, we believe that respondent should be suspended for three years and until further order of this court. Three years is a meaningful period of time which should be long enough both to impress upon respondent the shortcomings in the manner he has conducted his practice, and to allow him to take additional steps to insure that such events will not occur again if he resumes the practice of law.

Considering all of the circumstances of this case, we regard this disposition as consistent with the discipline awarded in other cases. In *In re Chapman* (1983), 95 Ill.2d 484, 69 Ill.Dec. 940, 448 N.E.2d 852, respondent was given a two-year probationary suspension for failure to prosecute an appeal. Like this respondent, Chapman had been previously suspended for three months, but that case is distinguishable, since Chapman's alcoholism was a factor in our decision. Further, we consider the pattern of neglect shown here in six separate instances plus the misstatements to be much more serious than the single instance of neglect proven in *Chapman*, and therefore to warrant a more severe sanction.

Our decision is consistent with the discipline in *In re Johnson* (1982), 93 Ill.2d 441, 67 Ill.Dec. 114, 444 N.E.2d 153. There, the attorney was suspended for one year for two counts of neglect involving the mishandling of a divorce and an estate. Similarly, in *In re Levinson* (1978), 71 Ill.2d 486, 17 Ill.Dec. 669, 376 N.E.2d 998, an attorney was suspended for six months for misconduct involving a single adoption proceeding. The neglect found here includes a greater number of instances, and for that reason alone, even without regard to the respondent's previous misconduct, calls for a longer suspension. The sanction imposed here is also justified by respondent's failure to satisfy the $10,000 judgment which Santillanes obtained against him, or to consummate his settlement with Mrs. Fouts by paying her the sum of $1,500 which he agreed upon.

On this record, we believe that the interests of the public, the legal profession and respondent would be best served by a suspension for three years and until further order of this court. In view of respondent's previous dis-

cipline, he will not be reinstated until this court is satisfied that he will not engage in similar misconduct in the future.

*Respondent suspended.*

UNDERWOOD, Justice, dissenting:

In my judgment, disbarment is the only appropriate discipline for attorneys who repeatedly engage in dishonest or deceitful behavior. This court has frequently stated that disbarment is warranted when the intentional misrepresentation which occurred here is established. (*In re Schneider* (1983), 98 Ill.2d 215, 224, 74 Ill.Dec. 500, 456 N.E.2d 2; *In re Hopper* (1981), 85 Ill.2d 318, 324, 53 Ill.Dec. 231, 423 N.E.2d 900; *In re Saladino* (1978), 71 Ill.2d 263, 276, 16 Ill.Dec. 471, 375 N.E.2d 102.) This is especially true when, as here, the misrepresentations are directed towards the attorney's clients and accompanied by other acts of misconduct. (*In re Feldman* (1982), 89 Ill.2d 7, 9-13, 59 Ill.Dec. 103, 431 N.E.2d 388; *In re Smith* (1979), 75 Ill.2d 134, 136-42, 25 Ill.Dec. 660, 387 N.E.2d 316; *In re Frey* (1976), 65 Ill.2d 130, 131-32, 2 Ill.Dec. 344, 357 N.E.2d 511.) The majority's suggestion that respondent's conduct was not fraudulent is clearly indefensible in light of our recent statement that fraud includes " '* * * anything calculated to deceive * * * whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture.' " (*In re Armentrout* (1983), 99 Ill.2d 242, 251, 75 Ill.Dec. 703, 457 N.E.2d 1262.) Too, the court has always considered an attorney's prior discipline for similar conduct a critical factor in its decisions to disbar. *In re Nesselson* (1969), 43 Ill.2d 262, 253 N.E.2d 455; *In re Broverman* (1968), 40 Ill.2d 302, 239 N.E.2d 816.

As the majority observes, this is not a case like *In re Chapman* (1983), 95 Ill.2d 484, 69 Ill.Dec. 940, 448 N.E.2d 852, where an attorney was guilty of a single instance of neglect, and where alcoholism and illness were important mitigating factors. We deal here with an attorney who was undeterred by his prior discipline, who admits to serious and repeated neglect in the handling of his clients' cases, and who has irreparably prejudiced his clients' legal rights through misrepresentations and nondisclosures. Under these circumstances I do not believe any sanction short of disbarment will adequately protect the public or maintain the integrity of the legal profession.

THOMAS J. MORAN, J., joins in this dissent.

# APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

June 4, 1984

Mr. William J. Harte
Attorney at Law
111 W. Washington, S#2025
Chicago, IL 60602

No. 58459—In re: Jack Levin. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on June 11, 1984.

# APPENDIX C

BEFORE THE HEARING BOARD
OF THE ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE STATE OF ILLINOIS

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | |
| JACK LEVIN, | ) | No. 81 CH 71 |
| | ) | |
| Attorney-Respondent | ) | |

## REPORT AND RECOMMENDATION OF HEARING PANEL

### INTRODUCTION

On August 25, 1981, the administrator of the Attorney Registration and Disciplinary Commission filed a six count complaint against the Respondent, JACK M. LEVIN, charging neglect of legal matters entrusted to the Respondent. Respondent filed an answer admitting most of the factual allegations of the complaint but denying the allegations of negligence.

The cause was heard before Hearing Panel Two on January 14 and 15, 1982, John M. Bowlus, Chairman, with Charley Popejoy substituting for Richard Smith, and Michael T. Caldwell substituting for Ward P. Fisher.

The administrator appeared by Jerome Larkin and John Holtaway. The Respondent appeared in person and was represented throughout the proceedings by Attorneys

William J. Harte and David J. Walker. After the conclusion of the two day hearing the matter was taken under advisement, pending a report and recommendation of the hearing panel.

## PROCEDURAL MATTERS

The administrator's six count complaint was filed on August 5, 1981. The matter was assigned to Hearing Panel Two and set for hearing in the Chicago offices of the Attorney Registration and Disciplinary Commission on October 29, 1981, at 10:00 a.m.

On September 23, 1981, the administrator filed a motion for the entry of default for want of an answer, which was allowed on October 12, 1981. The production of further evidence in support of the complaint was excused.

On October 26, the Respondent by William J. Harte, his attorney, moved the panel to vacate the order of default, setting forth grounds of lack of sufficient time to make the necessary arrangements for the retention of counsel. The Respondent's motion was allowed and the cause was rescheduled for hearing on October 29, 1981. The hearing was continued from October 29, 1981, to January 14, 1982, due to the engagement in emergency litigation of Respondent's counsel.

At the time of the filing of the complaint, the administrator had also filed a request to admit facts and genuineness of documents, requesting admissions to the genuineness of 26 documents. Respondent admitted that all 26 documents were genuine. All but Exhibit 21 were received into evidence upon stipulation and without objection. Exhibit 21 was admitted into evidence over the objection of Respondent's counsel.

In addition to the 26 exhibits admitted by stipulation, the administrator called as witnesses, the Respondent (under Section 60 of the Civil Practice Act), Christina Gomez, Josephine Carrera, Manuel Santillanes, Grace Colon, Bernard Davis, Matilda Jane Nelson, Anne Fouts, Bernard Perry, Yvonne Perry, and David Feldman. Respondent testified in his own behalf and also called Attorney William Mattix [*sic*] as a character witness.

There were no motions directed to the pleadings and none were filed in any portion or point of the proceeding.

## FACTS

During the period covered by the complaint, the Respondent was engaged in high volume plaintiff's personal injury practice, trying 25 to 30 cases per year to a verdict before a jury. Many of the cases were for relatively small amounts of money and many were difficult cases of contested, even questionable, liability. During the period in question, the Respondent accepted cases for Manuel Santillanes, Christina Gomez, Gerryl Monagain, Matilda Nelson, Anne Fouts, and Bernard and Yvonne Perry.

### Manuel Santillanes

Manuel Santillanes, 2128 South Halsted Street, Chicago, is a 41 year old factory worker. In 1973 Santillanes was injured in an altercation with Sollo Fovela, at the Le Terrace Lounge, which was apparently co-owned by Edward Alarcon, and the assailant. Upon his release from the hospital following the incident, the complainant contacted the Respondent on the advice of a friend, Grace Colon. Santillanes signed what was apparently a retainer contract.

Respondent thereafter filed suit (administrator's exhibit 2) on Janury 16, 1975. Summons was issued upon the filing of suit and returned on January 22, 1975, as "not found." On April 28, 1977, the suit was dismissed for want of prosecution.

Santillanes testified that he had a total of two contacts with the Respondent, once when he retained him and once in July of 1978. At the second meeting, Santillanes stated he had asked the Respondent about progress on his case and was told by the Respondent that the Respondent was working on it. Later, Santillanes went to the Civic Center, checked the court file, and discovered that the case was "closed." Santillanes stated that the Respondent never told him the actual status of the case. Santillanes subsequently sued the Respondent for malpractice and recovered a judgment. The Respondent felt that the judgment was void because a jury had been waived by the Plaintiff on the default prove-up without notice to the Respondent.

CHRISTINA GOMEZ

Christina Gomez, age 20, 2109 South Halsted Street, Chicago, lived with her mother and brothers and sisters in an apartment at 1832 South Loomis Avenue. The building, located on Loomis and Blue Island, had one front entrance and three rear entrances because of its size. The third floor apartment where Christina Gomez lived was entered through the front only because there was no key to the rear door. Gomez went to the fourth floor apartment immediately above her and was going to gain entrance to her apartment through a window adjacent to a fire escape. Gomez, while on the fire escape, fell through a hole on the fire escape, got caught on a portion of the structure on the way down, and then the rest of the structure collapsed, throwing her to the ground.

Gomez's mother, Josephine Carrera, was referred to the Respondent by Grace Colon and retained the Respondent about two weeks after the accident. Later in 1975, Carrera retained Respondent again to represent her daughter after the daughter had been struck by a car. Respondent gave Carrera no information regarding the fire escape case between these two meetings. In 1979, when Carrera complaint to the Attorney Registration and Disciplinary Commission about the handling of her daughter's case, the Respondent returned the attorney's contract (administrator's exhibit 5). Suit was never filed. Respondent explained that he was not in the habit of filing suit quickly in minor's cases, preferring to wait until injuries had become fully resolved.

JARRYL MONAGAIN

On June 22, 1977, Jarryl Monagain was involved in an automobile accident resulting in extensive damage to his motor vehicle. A dispute arose between Monagain and his insurer over the repairability of the automobile and authority for the repairs. Attorney David Feldman was retained by Monagain and referred the case to Levin for handling in February of 1978. Respondent's file shows that between May 3, 1978, and March 14, 1980, Feldman wrote Respondent seven times without receiving a written response. Interspersed between these letters were telephone calls to the Respondent by Feldman, urging action on the case and requesting cooperation by the Respondent with the client. In one such telephone conversation shortly after the letter of October 25, 1978, Respondent advised Feldman that suit had been filed on Monagain's claim and that it was proceeding along. Feldman later checked the Clerk's file and discovered no suit on file. Subsequently, a meeting between Levin and Feldman was

scheduled so that Feldman could be brought up to date on all matters being handled by Levin on referral. Respondent failed to keep the appointment. Feldman finally filed suit for Monagain against Montgomery Ward to protect the claim against the statute of limitations.

MATILDA NELSON

Sometime between September 27, 1974, and January 16, 1975, Respondent substituted as counsel for Plaintiff, Matilda Neison, in a suit she brought for personal injuries and malicious prosecution arising out of an altercation that occurred in the book store of the Prairie State College on February 11, 1971. It appears as if Levin was the third attorney representing Nelson in that suit.

In January or February of 1977, Nelson conferred with Levin, apparently at the court house, regarding settlement. Levin inquired whether the complainant would be willing to accept a small amount of money, $500, in settlement. The complainant declined the offer saying that she wanted at least $1500 in settlement. Respondent excused himself, went to talk with the other side and returned with an offer to settle in the amount of $700 to $800. Complainant declined the settlement offer and the meeting ended.

Thereafter, although the complainant attempted to reach the Respondent by phone and in person, she never saw the Respondent again until she saw him in the hearing room.

At about the same time as the settlement discussions were taking place, Nelson's lawsuit was pending on a complaint and answer and a motion by the Defendant for summary judgment. Plaintiff was given leave to file an amended complaint on or before January 31, 1977, with an ordered

rule to "promptly . . . (serve) . . . a copy of said pleading . . ." upon counsel for the defendant. The amended complaint was filed unsigned on February 4, 1977, with the firm of Starke, Anglan, Wertz, and May, as counsel for the plaintiff. On February 4, 1977, pursuant to a notice of motion served on the Respondent, the Nelson case was dismissed for failure to comply with the previous court order.

Respondent testified that the only time subsequent to his meeting with the complainant at the court house that he heard from her was when she called him a couple of years later with a worker's compensation claim, which Respondent did not accept because she was a referral client of Attorney Charles May. Respondent assumed that Mr. May handled the new case. Respondent also claims to have filed the amended complaint, but was extremely vague about the details of such filing.

ANNE FOUTS

Anne Fouts, 4300 Lindenwood Drive, Matteson, Illinois, retained Attorney Bernard Davis in 1969, to file suit for damages arising from the intoxication and subsequent wrongful death of her husband, Peter Fouts, who died as a result of injuries received in an accident that occurred on January 28, 1968. After suit was filed in Will County, Illinois, in 1968, Davis referred the case to the Respondent for further handling.

In the summer of 1973, Mrs. Fouts and her brother in law met Respondent at the court house in Joliet for what was apparently a pre-trial conference. At the meeting Fouts rejected an offer of $1500 to settle the case and the conference adjourned. Between 1973 and 1978, Fouts tried to contact the Respondent on numerous occasions,

only occasionally being successful. On those occasions when Fouts was able to establish contact with Respondent, his response to her inquiries concerning her case were extremely general. Also during this period, Attorney Davis made several written inquiries of the Respondent regarding the status of the Fouts suit. All of these inquiries went apparently unanswered.

In the meantime, on September 12, 1974, the Fouts suit was dismissed for want of prosecution, on motion of the defendant's attorney. A motion to vacate the dismissal and set the case for immediate trial was filed in October, 1974, but does not appear to have been acted upon by the court. Two years later, in April of 1976, the Respondent was given leave to file a petition under Section 72 of the Civil Practice Act. In the meantime, pursuant to local rule, the case was set for a pre-trial conference. On September 27, 1976, the case was stricken from the jury list and the previous judgment allowed to stand because the Respondent had failed to file any pleadings.

Subsequently, Anne Fouts, sued Attorney Davis and the Respondent for malpractice. A $3,000 settlement was negotiated with Fouts' new attorneys. Davis paid his half of the agreed settlement out of his own pocket. At the time of the hearing, Respondent had agreed to pay his share of the $3,000 malpractice settlement but had not done so.

BERNARD PERRY and YVONNE PERRY

In 1974, Bernard Perry and Yvonne Perry filed suit for personal injuries in the Circuit Court of Cook County. Thomas Donnelly was their attorney. In a motion filed in the court file on May 19, 1978, it appeared that plaintiff's depositions were scheduled and rescheduled 13 times

between February 18, 1975, and April 25, 1978, the plaintiffs having failed to appear on the last mentioned date. On June 16, 1978, the case was dismissed for failure to comply with discovery.

Mr. and Mrs. Perry's first contact with Levin occurred on April 25, 1978, when they went to their attorney's, Jack Marino's, office, for their deposition. Levin told the Perrys that their deposition was scheduled to take place in Skokie, Illinois, and that they could not attend on that date. Another date was later suggested to the Perrys which they could not accommodate because Mr. Perry was starting new employment. Nothing further was heard by the Perrys regarding their case until after they had complained to the Attorney Registration and Disciplinary Commission. They later received a settlement in the amount of $1500.

JACK LEVIN

On his own behalf, the Respondent testified that he was having serious personal problems involving his family. During the period in question, he became estranged from his wife who filed for divorce and later moved to Florida. In addition, the Respondent's daughter was having serious mental health problems. It is contended by the Respondent that these family pressures contributed to his neglect of the cases in question. Respondent also indicated that for some time prior to the advent problems, the Respondent's practice was a high-volume plaintiff's personal injury practice. He handled hundreds of files annually; worked extremely long hours; worked 7 days a week, and frequently brought work home. The practice was comprised of cases taken directly by the Respondent from the client at the outset of the claim, cases referred to him at some

point during pendency by other attorneys, and cases referred to him specifically for trial. Many of the cases were of dubious liability and, apparently because of the number of such cases that he handled, Respondent developed a reputation for attempting, as one witness put it, "to turn garbage into gold." This high volume, demanding practice contributed, if not caused, (at least in the Respondent's judgment) the threatened disintegration of his family.

Respondent further stated that he has changed his practice drastically by refusing new cases and cases in process, accepting only cases on referral from other lawyers for trial. The Respondent also acknowledged that on one previous occasion he had been disciplined by the Supreme Court for neglect.

In addition, in his behalf, the Respondent called Attorney William Mattix [*sic*], a practicing lawyer in Chicago who testified to his knowledge of the Respondent and the Respondent's reputation. In the witnesses' opinion, the Respondent wa fit for continuance in the practice of law.

## CONCLUSIONS

Between 1969 and 1979, Respondent represented the six complainants in some form or another. Manuel Santillanes and Christine Gomez were direct contacts recommended by a former client. Jarryl Monagain, Matilda Nelson, Anne Fouts and Bernard and Yvonne Perry were referred by other lawyers. Although all six complainants were personal injury or property damage referrals, in two cases the Respondent neglected to file suit. In the remaining four cases, suits, most of which were instituted by other lawyers, were dismissed for want of prosecution or other reasons. It is abundantly clear to the Panel that the

singular reason for the dismissals was the neglect of the Respondent. Santillanes' case was dismissed for failure to effect service. The remaining three dismissals were for procedural failures directly attributable to neglect of the Respondent; failure to promptly file an amended complaint (Nelson); failure to comply with a court order (Fouts); and failure to comply with discovery (Perry). While the Respondent offers two reasons for his non-performance of his professional duty, vis., a high volume intensely demanding practice and serious personal problems, neither of these facts of the Respondent's life excuses his conduct. Furthermore, neither does the relative lack of merit of any of the questioned cases offer an excuse for neglect.

The kindest evaluation that can be made of any of the six pertinent cases is that they are at best of questionable merit, with scant to non-existent chance of any substantial recovery. Nevertheless, the liability and collectability of each of these claims was readily apparent to the Respondent from the outset. Manual Santillanes was injured in a bar fight in which he may or may not have been an eager participant or aggressor. Even given liability, the likelihood of no recovery was apparent from the outset. While Christine Gomez may have had a decent claim, given the known history of these types of buildings in the Chicago area, the likelihood of unearthing a financially responsible property owner appeared remote. When an insurer appeared, albeit a shaky one, Respondent still did nothing.

The Monagain claim had a readily apparent outcome from the beginning. If the cost of repairs exceeded the value of the car, Respondent knew that the loss was limited to the wholesale value of the car, less the salvage. If repairable, the insurance company had the right to select the garage it deemed qualified to perform the re-

pairs. There is no mystery in this kind of claim and an attorney of the Respondent's experience in the tort field either knew it or should have known it.

The Fouts and Nelson cases were obviously, even from the pleadings, cases of extremely poor liability. Decedent Fouts was an intoxicated driver backing from a driveway when he was killed. Matilda Nelson was apparently an instigator in an incident over which she brought suit. She was never apparently arrested.

Finally, even if most of the discovery delays in the Perry case had been caused by the actions of persons other than the Respondent, the fact that there had been so many previously cancelled dates before the Plaintiffs' depositions demanded much more serious attention to securing a firm date for the depositions than the Respondent devoted to it.

The Panel implies no criticism of the Respondent for accepting cases of such adverse liability or apparently limited recovery. In fact, Respondent is to be commended for accepting such difficult cases for clients who would not ordinarily have had a day in court. However, once accepted, each of these cases is entitled to the same consideration as a similar case with good liability or a clear chance of recovery. Once cases are accepted, each of these clients is entitled to be treated with the same professional consideration as clients with good cases. One doubts that clients with good cases who were represented by the Respondent were similarly treated, otherwise, the number of complaints against the Respondent might have been considerably greater.

There is furthermore, no solace or comfort to be found in the fact that only six cases over a ten year period resulted in a complaint when the Respondent was han-

dling literally hundreds, maybe even thousands of cases during this period. If the six cases in question are in any way representative of the Respondent's practice, the six cases may be merely the tip of an enormous iceberg comprised of questionable cases for hundreds of unsophisticated clients.

No doubt exists in the mind of the Panel that during the heart of the period involved the Respondent was embroiled in serious, substantial marital and family problems. Whether these problems were caused wholly or partly by the nature of the Respondent's practice is largely academic. The fact of the matter remains that the Respondent had a professional obligation to promptly do something with these cases, whether that was referring the cases back to the lawyer who referred them to the Respondent in the first place, referring the cases to other counsel, or returning the retainer contracts to the clients, or even taking some direct action to bring them to a satisfactory conclusion. It is undoubted that the personal problems of the Respondent may be part of the reason for his inaction on the cases. However, those problems cannot excuse the deviation of the Respondent from required professional standards.

## FINDINGS

1) Jack Levin was admitted to practice in the State of Illinois in 1959.

2) That he accepted the case of Manuel Santillanes from the client directly in 1975; filed suit but failed to effect service on the defendant, resulting in the dismissal of the case for want of prosecution.

3) That he accepted a contract of employment on behalf of Christina Gomez and failed to take any substantial legal action on that claim.

4) That he accepted a referral of the claim of Jarryl Monagain in 1977 and failed to take any substantial action on that claim.

5) That he accepted the referral of the claim of Matilda Nelson and failing to negotiate a settlement acceptable to the client, failed to comply with orders of the court respecting an amended complaint, resulting in the dismissal of the case for want of prosecution.

6) That the Respondent accepted the referral of the case of Anne Fouts, and failing to negotiate a settlement of the case satisfactory to the client, allowed the case to be dismissed for want of prosecution for failure to comply with local pre-trial rules.

7) That the Respondent accepted the referral of the cases of Bernard Perry and Yvonne Perry and failed to exercise diligence in complying with discovery, resulting in the dismissal of the cases.

8) That in each of these instances, the neglect of the Respondent was further aggravated by almost total lack of substantial communication with the clients.

9) That the Respondent has been guilty of neglect, conduct resulting in prejudice to his clients, and others and failing to carry out contracts of employment in violation of DR 6-101 (a) (3), 7-101 (a) (1) (2) (3).

10) That the Respondent, while guilty of a complete failure to communicate with his clients, has not been guilty of dishonesty, fraud, deceit, or misrepresentation, as contemplated by DR 1-102 (a) (4), or as charged in the complaint.

11) That the Respondent was previously suspended from the practice of law for three months for neglect. That the Respondent's failure as outlined above may have

been due in part to the voluminous high pressure nature of his practice and serious personal problems.

12) That notwithstanding any reasons advanced by the Respondent for his conduct, the conduct of the Respondent represents a substantial departure from an acceptable standard of professional conduct, and in light of his previous misconduct, warrants discipline.

13) That the evidence does not support the administrator's requested discipline of disbarment.

14) That the evidence warrants the imposition of discipline of suspension for a definite period of time.

## RECOMMENDATION

It is the recommendation of the Hearing Panel that the Respondent, JACK M. LEVIN be suspended from the practice of law for a period of two (2) years.

Respectfully submitted,

HEARING PANEL TWO

/s/ John M. Bowlus
Chairman

/s/ Charley Popejoy

/s/ Michael T. Caldwell

# APPENDIX D

BEFORE THE REVIEW BOARD OF
THE ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

Administrator's No. 81-CH-71

In the Matter of:
JACK LEVIN,
Attorney-Respondent.

## REPORT AND RECOMMENDATION OF THE REVIEW BOARD

The matter comes before the Review Board on the recommendation of the Hearing Board that the Respondent, Jack M. Levin, be suspended from the practice of law for a period of two years.

The request by the Administrator for leave to supplement the record is denied. After full consideration and review of all matters of record, the Review Board affirms the Hearing Board's recommendation that the Respondent, Jack M. Levin, be suspended from the practice of law for a period of two years.

The report and recommendation of the Hearing Board is attached hereto.

Respectfully submitted,

L. Michael Getty, Chairman
Herbert J. Bell
Chester L. Blair
C. William Fechtig
Watts C. Johnson
Marshall A. Susler

Chester L. Blair recommends that the Respondent be suspended for a period of one year.

Members Richard L. Kahn, John Cadwalader Menk and Martin L. Silverman did not participate.

This matter decided February 25, 1983.

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Office - Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-375 (3)

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

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JACK M. LEVIN, Petitioner

v.

Attorney Registration
and Disciplinary
Commission of the
Supreme Court of
Illinois, Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

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## INTRODUCTION

For the sake of brevity, Respondent will not provide sections in its brief for opinion below, jurisdiction, statute involved and statement of the case. Respondent will address in its argument those portions of those sections of Petitioner's brief which Respondent considers inaccurate or inadequate.

## QUESTIONS PRESENTED

I. Whether Petitioner has failed to invoke federal jurisdiction pursuant to 28 U.S.C.§1257(3)

II. Whether Petitioner has raised a substantial federal question.

## SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Supreme Court of Illinois. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that Petitioner fits within the exception claimed by him as Petitioner had reason to expect that the Court would decide the case as it did.

Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issue in fact raised by this petition is an issue of state law.

## ARGUMENT

### I.

### PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C.§1257(3)

Petitioner is required to demonstate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioner has failed to do so.

The judgment of the Supreme Court of Illinois imposing discipline upon a lawyer whom it licensed is a matter within its authority. Goldfarb v. Virginia State Bar, 421 U.S.773, 792 (1973). Lawyers have historically been "officers of the court". See, e.g., In re Primus, 436, U.S. 412, 422 (1978). In Illinois, the power to discipline an attorney is inherent in the Supreme Court of Illinois. In re Teitelbaum, 13 Ill.2d 486, 150 N.E.2d 873, cert. denied, 358 U.S. 881, rehearing denied, 358 U.S. 923 (1958). Disciplinary proceedings are original proceedings in the Supreme Court of Illinois. In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977).

Petitioner concedes that in order to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, he must establish that his case fits within an exception (Petition, p.25). Petitioner first raised his federal constitutional claims of a denial of equal protection and due process in his petition for rehearing after the judgment of the Supreme Court of Illinois. As the Illinois Court denied the petition without entertaining the federal question (App.p.11), the general rule precludes review by this Court. Consolidated Turnpike Co. v. Norfolk & Ocean View Railroad Co., 228 U.S. 326, 334 (1912).

The exception claimed by Petitioner requires that Petitioner demonstrate that the opinion of the Supreme Court of Illinois supplied a new or unexpected basis for his recently asserted federal claim. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). However, the exception applies only to cases where the federal claim could not have been anticipated and therefore the petition for rehearing afforded the first opportunity to raise the question. Missouri Insurance Co. v. Gehner, 291 U.S. 313 at 320 (1929).

Petitioner has failed to demonstrate any circumstances similar to cases in which this Court has applied the exception. This Court has applied the exception in cases in which a state Supreme Court suddenly reversed a long

standing precedent, issued an unprecedented construction of state law which effectively denied petitioner a forum in which to seek relief, or uniquely construe a state statute which infringed federal rights. Great Northern Railway, Id.; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.SS. 673 (1930); Missouri Insurance Co., Id.

Petitioner's claim that he could not have anticipated that the Supreme Court of Illinois would increase the quantum of discipline from two years to three years and until further order of the Court is self-serving. It is refuted by the rules of the Supreme Court of Illinois, its prior disciplinary opinions and the record in Petitioner's disciplinary proceeding.

Petitioner knew from the institution of these proceedings that he faced the possibility of discipline, including the most severe sanction of disbarment. Supreme Court Rule 771, as amended on June June 1, 1980, provided that the Court could impose one of the following sanctions:

a) disbarment;
b) disbarment on consent;
c) suspension for a specified period of time and until further order;
d) suspension for a specified period of time; and
e) censure.

Paragraph c requires that after the conclusion of the specified period of suspension that a disciplined attorney establish fitness to resume the practice of law in a reinstatement proceeding prior to resuming the practice (App.A,C & D). Disbarment would have required a disciplined attorney to wait five years prior to filing a petition for reinstatement. Ill. Rev. Stat.1980, 110(A), S.Ct. Rule 767.

Petitioner cannot seriously claim that he did not have notice of the possibility of imposition of discipline as severe as suspension of three years and until further order of the Court. The Administrator, who is charged with prosecuting disciplinary cases, urged the most severe sanction of disbarment at every stage of the three-tiered disciplinary proceeding. (Petitioner's App.A, p.1-2, App.C, p.26.)

Petitioner had notice that the Court would consider the Administrator's position because the Court granted the Administrator leave to file exceptions, to file a brief and to make oral argument in support of the Administrator's position that disbarment was warranted (Petitioner's App.A, p.1-2) Petitioner's admitted failure to raise any federal question regarding the Court's authority to increase the sanction, especially in light of the Administrator's recommendation of disbarment, reflects nothing more than a conscious decision to avoid raising any federal question before the State Court.

Petitioner cannot assert seriously that he was not on notice that the Court reserved to itself the right to alter the quantum of discipline recommended by the Hearing and Review Boards. Long prior to the institution of this disciplinary proceeding, the Court had repeatedly held that recommendations of the Hearing and Review Boards as to the amount of discipline are advisory only and that the final responsibility for selecting an appropriate sanction rests with the Court. In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980).

Prior decisions of the Supreme Court of Illinois, including the case in which Petitioner was suspended for three months for one act of neglect, In re Levin, 97 Ill.2d 205, 395 N.E.2d 1974 (1979), put Petitioner on notice that a suspension for a substantial length of time was likely. Petitioner has conceded that he neglected six additional matters entrusted to him by clients. Petitioner's continuation of his neglectful conduct made it likely that a suspension in excess of the two years recommended by the Hearing and Review Boards would be imposed. The Illinois Court had imposed one year suspensions upon attorneys who neglected two or three matters, but who had not been the subject of prior discipline. In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Johnson, 93 Ill.2d 4441, 444 N.E.2d 153 (1932).

The petition appears to concede that Petitioner could have anticipated a three year suspension. While Petitioner erroneously concludes that the Court employed a mechanistic standard by adding six months suspension for each count of neglect (Petition, pp. 18, 53-59), a reasoned analysis would indicate that Petitioner's pattern of repeated neglect should be treated differently than two instances of neglect.

As a recidivist, Petitioner should have known that he was subject to a suspension until further order of the Court. In 1978 the Illinois Court imposed a suspension of six months and until further order of Court upon a lawyer whose neglect of one matter was willful and gross. In re Levinson, 71 Ill.2d 486, 376 N.E.2d 998. The decision put Petitioner on notice that the Supreme Court of Illinois is serious about protecting the public from attorneys whose cavalier conduct harm the public. The Court stated:

> ...we believe that future clients should not be exposed to the possibility of treatment such as the Sotos received until there appears greater reason than now exists to expect Respondent's adherence to normal professional standards.

Petitioner has failed to demonstrate that this Court has jurisdiction to review the final disciplinary judgment of the Illinois Court. Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that Petitioner fits within the exception claimed by him as Petitioner had reason to expect that the Court would decide the case as it did.

II.

**PETITIONER HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION.**

Mere allegations that a federal question exists will not confer federal jurisdiction. Rather, there must be a real substantive federal question on which the case turns in order to involve the jurisdiction of the Supreme Court. See, Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). The petition will be denied if it appears that the federal question is merely formal, is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by decisions of this Court's to leave no room for real controversy. Id.

No genuine federal question has been raised by this petition. The only issue raised by Petitioner is an issue of state law which the Supreme Court of Illinois decided.

Petitioner does not claim that the sanction imposed is not proportionate to the misconduct proved. Petitioner's claim that the constitution requires the Illinois Court to make his sanction consistent with others who were found to violate the same disciplinary rule is without merit. (See Petition, pp. 36-479. This Court has rejected the notion that any such constitutional right of "proportionality" exists, even in a criminal proceeding where the sanction is death. Pulley v. Harris, 52 U.S.C.W. 4141,4143 (1983). While no such federal right exists, the Supreme Court of Illinois did impose discipline consistent with its prior cases.

Even if it could be said that a criminal defendant were entitled to this type of "proportionality," the concept should not appy to a disciplinary proceeding. A disciplinary proceeding is not criminal in nature. In re Daley, 549 F.2d 469, cert. denied (7th Cir. 1977) 434 U.S. 829 (1977). An attorney charged in a disciplinary proceeding is entitled to fundamental due proccess. The attorney is not entitled to the full panoply of rights afforded to an accused

in a criminal case. In re Harris, 93 Ill.2d 285, 443 N.E.2d 557, 560 (1982). Petitioner appears to recognize this principle (P.,p.38). Petitioner makes no claim that he did not receive notice and a full opportunity to defend himself.

Petitioner's alleged constitutional claim does not rise to the level of those involved in Schware v. Board of Bar Examiners, 353 U.S.232 (1957) or Konisburg v. State Bar of California, 353 U.S. 252 (1957). In Schware and Konisburg, this Court held that it was a violation of due process and equal protection rights for a state to exclude an applicant to the bar where there was no evidence adverse to the applicant. Petitioner, already a recidivist, concedes that the six instances of neglect provide a basis for discipline.

Petitioner is requesting this Court to review the decision of the Supreme Court of Illinois involving state law. The Supreme Court of Illinois exercised its long recognized and inherent authority in the discipline of one upon whom it had bestowed the privilege of being considered an officer of the Court. Goldfarb v. Virginia State Bar, 421 U.S.733, 792 (1975); In re Teitelbaum, 13 Ill.2d 586, 150 N.E.2d 873, cert. denied, 358 U.S.881, rehearing denied, 358 U.S.923 (1958).

Petitioner does not claim that the standards employed by the Supreme Court of Illinois in selection of an appropriate amount of discipline are unconstitutional (Pet., pp. 30, 37-40). Clearly, those standards exceed any federal constitutional requirement as they reflect the Illinois Court's effort to impose sanctions consistent with those imposed on other attorneys and consistent with all the circumstances of the case. In re Saladino, 71 Ill.2d 263, 275 N.E.2d 102 (1978).

The due process and equal protection provisions of the United States Constitution do not require more than the standard employed by the Supreme Court of Illinois. This Court has never held that attorney discipline must be imposed in a mechanistic fashion so that a violation of a certain disciplinary rule necessarily results in the imposition of the exact same quantity of discipline. As Petitioner concedes (Petition, pp.53-55), such a mechanistic approach might give an attorney less consideration than the effort of the Illinois Supreme Court to employ flexibility in selecting a consistent sanction after review of all the facts and circumstances.

Petitioner's only argument appears to be that the Court did not follow its guidelines in the selection of the sanction imposed (Petition, pp. 19, 53-59). Petitioner's argument is without merit.

The opinion of the Supreme Court of Illinois reflects that it did follow its guidelines. The Court carefully considered all of the circumstances surrounding Petitioner's misconduct. (App. A, pp.6-9) The Court attempted to balance the need to protect the public and profession from the continued harm inherent in Petitioner's repeated and willful neglect with the desire to impose consistent discipline. The Court also considered the unrebutted evidence of Petitioner's frequent and false statements to his clients.

The Supreme Court of Illinois appropriately concluded that Petitioner posed a greater threat than other attorneys upon whom it had imposed lesser sanctions. (Petitioner's App.A, pp. 5-8) The Court correctly noted that the amount of Petitioner's discipline was consistent with the one year suspension imposed in In re Johnson, 93 Ill.2d 441, 444 N.E.2d 153 (1982). Johnson, who had no history of misconduct, had neglected two maters. Petitioner's misconduct was far more pervasive and required a greater response by the Court.

Similarly, Petitioner's discipline is consistent with In re Chapman, 94 Ill.2d 484, 448 N.E. 2d 852 (1983). While Chapman was also a recidivist, only one instance of neglect was before the Court. The Court imposed a two year

suspension. As the Court concluded that alcoholism contributed to Chapman's neglect, the Court stayed the suspension and placed him on probation, a sanction consistently applied by the Court under those circumstances.

The Illinois decisions cited by Petitioner are clearly distinguishable from Petitioner's case. (Petition, pp.19,40) In re Kink, 92 Ill.2d 293, 442 N.E.2d 206 (1982); In re Taylor, 66 Ill.2d 567, 363 N.E.2d 845 (1977); In re Ahern, 23 Ill.2d 69, 177 N.E.2d 197 (1961). None of these cases involved a recidivist. Kink and Taylor involved one-half as many matters as the six matters neglected by Petitioner.

Petitioner's case is distinguishable because of the fact that he caused four of his clients to lose their rights to pursue their claims. In Kink, the administration of three probate estates were delayed, but no other prejudice occurred. In Taylor only one of the three matters resulted in prejudice to a client.

Petitioner's case is more serious than Kink, Taylor and Ahern in that Petitioner consistently misrepresented the status of matters to his clients. Only in Kink was there any evidence of misrepresentation. That was an isolated representation that Kink had mailed documents when he had not done so. In re Kink, 442 N.E.2d at 209.

The imposition of the requirement that Petitioner demonstrate fitness prior to his resumption of the practice of law is consistent with the decisions of the Supreme Court. In In re Levinson, 71 Ill. 2d 486, 376 N.E.2d 998 (1978), the Court suspended Levinson for six months and until further order of the Court for one aggravated instance of neglect. The Court reasoned in Levinson that in light of the willful neglect demonstrated by the attorney, that it could not certify him as fit to represent clients until he demonstated that he had become fit. The willful and repeated instances of neglect demonstrate that Petitioner poses a similar, but more pervasive threat to the public, profession and courts. In light of the gravity and pervasiveness of Petitioner's misconduct, the fact of his prior discipline, and the fact that Petitioner had not yet made restitution to the victims of his neglect, the Court appropriately imposed the condition that Petitioner demonstrate his fitness in a reinstatement proceeding prior to any return to the practice of law (App. A, pp.8-9)

The petition requests this Court to substitute its judgment for that of the Supreme Court of Illinois as to the amount of discipline required by Petitioner's misconduct. The petition apparently cites portions of the

transcript of the hearing in the disciplinary case favorable to Petitioner. The transcript is not included in the appendix. In light of the purpose of this brief, Respondent will not address each citation or correct the record.

Petitioner has failed to raise any substantial federal constitutional question which makes review by this Court necessary or appropriate. The only issue in fact raised by this petition is an issue of state law.

## CONCLUSION

WHEREFORE, the Administrator respectfully requests that the Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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